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**DA 97-670**

10-10-68

**In the Matter of**

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MM Docket No. 96-77  
RM-8780  
RM-8918

**Adopted: April 2, 1997**

**Released: April 11, 1997**

**Comment Date:** June 2, 1997

**By the Chief, Allocations Branch:**

1. The Commission has before it the Notice of Proposed Rule Making, 11 FCC Rcd 4658 (1996), issued in response to the petition for rule making filed by Great Plains Broadcasting Co., Inc. ("petitioner"), proposing the allotment of Channel 279A to Hobbs, New Mexico, as the community's fifth local FM and seventh local aural service. Comments were filed by the petitioner and Ojeda Broadcasting, Inc. ("Ojeda"), stating their individual intention to apply for the channel, if allotted to Hobbs. A counterproposal was filed by MTD, Inc.<sup>2</sup>

2. MTD counterproposes that Channel 296C be allotted to Tatum, New Mexico, as the community's first local aural transmission service. To accommodate the allotment at Tatum, MTD also requests that Channel 279C1 be substituted for unoccupied but applied-for Channel 296C1 at Jal, New Mexico.<sup>3</sup> MTD states that Tatum, with a 1990 U.S. Census population of 768 persons, is an incorporated village, with its own elected Mayor-town council local government. According to MTD, Tatum provides its citizens with municipal services which include local water, sewer and ambulance service. In addition, Tatum has its own local schools, library and senior citizen organization, as well as businesses which incorporate Tatum in their name, such as Tatum Towing & Storage, Tatum Well Service, Tatum Cash Grocery, and the Tatum Clinic. MTD states that it will apply for Channel 296C, if allotted to Tatum. MTD contends that the

<sup>1</sup> The communities of Tatum and Jal, New Mexico, have been added to the caption.

<sup>2</sup> Public Notice of the counterproposal was given on November 5, 1996, Report No. 2163.

<sup>3</sup> On April 4, 1995, John H. Wiggins ("Wiggins") filed a first-come/first-served application (BPH-950404MA) for Channel 296 at Jal, New Mexico, and proposed the substitution of Channel 296C1 for the existing Channel 296A allotment. On February 18, 1997, after the filing of MTD's counterproposal, the Commission granted Wiggins' application.

provision of a first local aural service to Tatum will better serve the public interest than the allotment of a seventh local aural service to Hobbs, citing the allotment priorities in Revision of FM Policies and Procedures, 90 FCC 2d 88 (1982).<sup>4</sup> At the time that MTD filed its counterproposal, no reimbursement was required to Wiggins because he was an applicant and not a permittee or licensee. However, MTD states that, if necessary, it will reimburse Wiggins for the costs necessary to change to Channel 279C1. Now that Wiggins is a permittee, he is entitled to such reimbursement. See Circleville, Ohio, 8 FCC 2d 159 (1967).

3. In order to proceed with the proposals in this proceeding, it is necessary to issue an Order to Show Cause to the permittee of Channel 296C1 at Jal seeking comment on why his construction permit should not be modified to specify operation on Channel 279C1, in lieu of his present Channels 269C1. Channel 296C can be allotted to Tatum in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.2 kilometers (8.2 miles) west, at coordinates 33-15-27 North Latitude and 103-27-22 West Longitude, to avoid a short-spacing to Stations KPOS-FM, Channel 297C2, Post, TX, and KSMX, Channel 298C1, Clovis, NM. Channel 279C1 can be allotted to Jal at the transmitter site specified in Wiggins' outstanding construction permit, 32-25-53; 103-09-08, which is 35.3 kilometers (22 miles) north. Mexican concurrence in the allotment of Channel 296C at Tatum and 279C1 at Jal is required since both communities are located within 320 kilometers (199 miles) of the U.S.-Mexican border.

4. Although Wiggins, permittee of a new FM station on Channel 269C1 at Jal, New Mexico, is provided an opportunity to object to the proposed channel change, this Order does not afford an additional opportunity either to comment on the merits of the proposal set forth in the Notice or the counterproposal advanced by MTD. See Angola, Indiana, et al., 5 FCC Rcd 2000 (1990).

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, John H. Wiggins, permittee of a new station on Channel 269C1 at Jal, New Mexico, SHALL SHOW CAUSE why his construction permit (BPH-950404MA) SHOULD NOT BE MODIFIED to specify operation on Channels 279C1 as proposed herein instead of his present Channel 269C1.

6. Pursuant to Section 1.87 of the Commission's Rules, Wiggins may, not later than June 2, 1997, file a written statement showing with particularity why his permit should not be modified as proposed in the Order to Show Cause. The Commission may call on Wiggins to furnish additional information. If Wiggins raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of the modification for hearing. If no

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<sup>4</sup> The allotment priorities are: (1) first fulltime service; (2) second fulltime service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

written statement is filed by the date referred to above, Wiggins will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Notice of Proposed Rule Making and Order to Show Cause to the permittee of Channel 269C1 at Jal, as follows: John H. Wiggins, 2300 Hammond Road, Apartment 3, Bay City, Texas 77414.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

#### FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
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Policy and Rules Division  
Mass Media Bureau